IN THE

Supreme Court of the United States

October Term, 1978
No. 78-877

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the Trustees of the Operating Engineers Pension Trust, file this reply brief to address arguments first raised in the Brief for the Respondent in Opposition, Pension Benefit Guaranty Corporation ("PBGC"):

1. PBGC does not deny the foreseeable "mass exodus of employers from participation in multi-employer

pension trusts" arising from the Court of Appeals' interpretation of ERISA. (Op. Br., p. 8.) PBGC asserts, however, that the Trustees' only recourse is to Congress because any "adverse economic effects on pension trust funds" are attributable to "the law passed by Congress."

The Trustees are not so resigned to the inevitability of the interpretation of ERISA proposed by PBGC, and find little solace in blaming Congress for the foreseeable injury to the retirement security of millions of participants in multi-employer pension trusts. The petition has shown a logical alternative interpretation of the statute which maintains the stability of multi-employer pension trusts and which is supported by the traditional concept of a "defined contribution plan", by the legislative history of ERISA, and by current official pronouncements of the Department of Labor and the Department of the Treasury.

The most experienced and time-tested administrative agency is not entitled to the degree of judicial deference now claimed by PBGC. *International Brotherhood of Teamsters, etc. v. Daniel,* No. 77-753 (Jan. 16, 1979), Sl. Op., p. 14. Indeed, PBGC now contends (Op. Br., pp. 6-7, n. 2) that its own view of the statutory definition of "defined contribution plan" appearing at 29 U.S.C. § 1002(34) is so clear and unambiguous that "*reference to the legislative history is unnecessary.*" (Emphasis added.) This contention is both erroneous and remarkable, considering that nowhere in the opposing brief does PBGC set forth the entire statutory definition (Pet., p. 3), much less attempt to reconcile the various segments of the definition with its view that benefits from such a "pension plan" cannot amount to more than disbursement of a savings account. This Court's own recent efforts to distinguish between "defined contribution plan" and "defined benefit plan" reflect the lack of clarity in the statutory definition and well illustrate the very real need for resolution of this fundamental issue. *Cf., Alabama Power Company v. Davis,* 431 U.S. 581, 593, 97 S.Ct. 2002, 2009, n. 18 (1977), with *International Brotherhood of Teamsters, etc. v. Daniel, supra,* Sl. Op., p. 2, n. 3.

Showing due consideration of PBGC's views, the statutory interpretation issue presented by this case holds the potential for irreversible effects of the most serious consequence to multi-employer pension trusts and deserves careful judicial charting rather than administrative experimentation. Congress envisioned PBGC simply as an organization for providing insurance to reduce the risk that an employer which had promised its employees a "fixed benefit" at retirement would be unable to perform at the retirement date. Now PBGC views itself as having the power to dislodge the legal structure of existing multi-employer pension trusts in order to insure them, even at the expense of destruction of the trusts.

2. PBGC's quotation of the record stipulation regarding the manner in which an individual employee's benefits are computed by the Trustees at the time of retirement (Op. Br., p. 5) may create the erroneous impression that the Trustees do not maintain records of the amounts actually paid to the Trust by employers on behalf of each individual participant. As PBGC was well informed at the time the stipulation was drafted, and surely would concede now, the Trustees necessarily must and do maintain complete records accounting for the amounts owed and the amounts actually paid by each employer with respect to each individual employee participating in the Trust. The quoted stipulation

merely reflects the manner in which a particular computer printout provides information necessary to calculate the monthly pension benefit at retirement based upon provisions of the Plan. Thus, the Trustees do maintain "individual accounts" for each participant reflecting the precise basis for that participant's rights in the Plan in terms of contributions owed to the Plan, contributions received by the Plan, and assets of the Plan allocated to the participant according to rules of the Plan, albeit such an "individual account" is not in the nature of a "savings account" as envisioned by PBGC.

3. The Court of Appeals' decision makes participating employers liable for the cost of any benefits adopted or increased by the Trustees, and benefits described in the Plan (assuming the Plan is now regulated as a "defined benefit plan") can no longer be adjusted downward as expressly authorized by the Plan if the previous actuarial projections of the Trustees prove to have been too optimistic. [Act § 204(g), 88 Stat. 862, 29 U.S.C. § 1054(g).] In the district court, PBGC contended that the Trustees are viewed by ERISA as "representatives" of the employers for purposes of determining the level of benefits in the Plan (RA: 366, 380-81), and those Trustees' "promises" of benefits were the equitable basis of employer liability for the full cost of the benefits described.

Yet the opposing brief does not fairly address the realities shown by the petition that: (1) if the true measure of employer liability is to be the eventual cost of benefits adopted by the Trustees rather than the money payment fixed in the collective bargaining agreement, then the role of a trustee as an independent fiduciary will be compromised by employer efforts to

control trustee decisions; and, (2) indeed, § 8(b)(1)(B) of the National Labor Relations Act [61 Stat. 141, 29 U.S.C. § 158(b)] will guarantee the employer's right to choose and control any person who makes the employer's commitments regarding employee benefits.

Rather than confront these concerns, PBGC poses and disposes of several illusory premises, namely:

(a) That employer contingent liability is merely a concern for possible adverse investment results which may increase collective bargaining pressure for future "fixed contribution" rate increases. (Op. Br., p. 7.) (If the Plan is a "defined benefit plan" as decided by the Court of Appeals, employers would have contingent liabilities for benefits accrued during past and current employment, with additional costs varying according to investment results, the accuracy of actuarial predictions, and increases of benefits by the Trustees.)

(b) That imposing "defined benefit plan" status on the Plan merely requires payment of premiums to PBGC, which cannot possibly interfere with the Trustees' abilities to function as independent fiduciaries. (Op. Br., p. 8.) (The payment of premiums is no more than incidental to the change from "defined contribution plan" status. Adoption of benefits by the trustees of a "defined benefit plan" would be treated by ERISA as a "promise" of economic liability on behalf of the employers, and thereby create in fact an agency relationship between such trustees and the responsible employers.)

(c) That the Trustees contend "the NLRB has imposed on the trustees an obligation to act both as fiduciaries and § 8(b)(1)(B) representatives . . ." (Op. Br., p. 8, n. 3.) (In fact, the petition clearly states that the NLRB has regarded trustees of multi-employer benefit trusts as "solely independent fiduciaries" [Pet., pp. 10, 13-14] because such trustees have not had authority to enlarge the liabilities contracted for by employers who contribute to such trusts. Undoubtedly, the outcome of NLRB decisions on that issue would be critically affected by the Court of Appeals' view, advanced by PBGC, that ERISA makes employers liable for the costs of benefits adopted by trustees of multi-employer pension trusts.)

The Court of Appeals' decision was not considered or discussed by the NLRB in its recent decision of *United Mine Workers of America, Local 1854* (*Amax Coal Co.*), 238 N.L.R.B. No. 214, 99 LRRM 1670 (1978) and, therefore, the union right to strike to require employer participation in the trust was maintained in that case based upon the trustees' role as "solely fiduciaries" in performing their "discretionary functions in the internal administration of the trust . . . ." *Id.*, 99 LRRM at 1677.[1] The petition for review should be granted in order to assure that the union right to strike to require employer participation in a multiemployer pension trust as protected by the NLRB *Amax Coal Co.* decision will not be lost to the Trust and all similar trusts upon final disposition of this case.

[1]Reconciliation of the proper interpretation of ERISA with the pre-existing federal laws governing collective bargaining is a major facet of this case. In this regard, on January 17, 1979, PBGC made application to the Clerk of this Court for an

(This footnote is continued on next page)

Conclusion.

Based upon the foregoing and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1979.

extension of time within which to file its opposing brief on grounds that the Solicitor General of the United States "has indicated that additional time is needed to consult with the National Labor Relations Board . . ." The Trustees respectfully note that the Solicitor General does not appear as counsel for the respondent on the opposing brief. Therefore, the views expressed by PBGC in the opposing brief apparently have not yet been reconciled with the views of other responsible federal agencies. The important and urgent task of construing ERISA in the light of collective bargaining laws remains to be accomplished by this Court through the granting of the petition for review.